

88-296

No.

Supreme Court, U.S.

FILED

AUG 18 1988

JOSEPH F. SPANROL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. SHOSTAK,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

WALTER J. SHOSTAK

Pro Se

29 West 12th Street

Bayonne, New Jersey 07002

(201) 436-6363

QUESTION PRESENTED FOR REVIEW

Why Petitioner, Walter J. Shostak was denied "party status" by the Federal Energy Regulatory Commission (FERC or Commission) relative to FERC DAM Project No. 9074.000 (License application for Adirondack Hydro Development Corporation) and Project No. 8719.000 (Preliminary Permit Application for Schroon River Associates), after petitioner filed a timely "Motion to Intervene", dated May 24, 1985, pursuant to 18 CFR 385.214(b) and (c) 1987. The key issue in this case is this Intervention letter of May 24, 1985. Neither FERC nor The Second Circuit Court of Appeals commented on this letter. This letter established "Party Status" for petitioner and itemized the basis in fact and law why petitioner has a right to participate in The proceedings for FERC projects 8719 and 9074.

PARTIES TO THE PROCEEDING

Walter J. Shostak, Petitioner, will
be acting on his own behalf, pro-se:

Respondent is the Federal Energy
Regulatory Commission (FERC or
Commission).

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, whose Order is sought to be reviewed and is reprinted in Appendix A and Appendix C. The prior opinion of the agency (Federal Energy Regulatory Commission) order is reprinted in Appendix B.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was filed on February 16, 1988. (Appendix A) A timely petition for rehearing was denied on May 25, 1988 (Appendix C) and this petition was filed within ninety days of that date.

This court jurisdiction is invoked under Title 28 United States Code, Section 2101(a) and Section 1254.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The United States Constitution

provides:

Amendment XIV: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 42 United States Code

Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Shostak, brought an action in the United States Court of Appeals, Second Circuit (Docket 87-4112) alleging violations of his constitutional rights, under Title 42 United States Code Section 1983. Federal jurisdiction was invoked under Title 28 United States Code Section 1254. G

Petitioner is a landowner whose property will be affected by the rehabilitation of the existing dam at Warrensburg, New York. The existing dam has been unused for approximately ten years and under this project, major alterations will be made to this dam.

Petitioner alleges that, under the terms of the existing Water Rights Deed of October 14, 1895, filed in Warren County, New York, in Book 74 Page 270

this existing dam may not be modified. Application submitted to FERC for licensing calls for major dam modifications.

REASONS FOR GRANTING WRIT

Petitioner alleges that he was denied "Party Status" to the "Proceedings" or equal protection guaranteed by the Fourteenth Amendment. Petitioner closely followed this project from the inception, by phone conversations with the FERC Washington, DC office and the FERC New York District Office.

Two Applications were submitted for this project, namely, FERC 9074 (Licensing on March 29, 1985) and FERC 8719, (Preliminary Permit on November 15, 1984). Each application was submitted by different firms and yet both appear on

the final license issued January 30, 1987. (38 FERC 62,087)

The Court of Appeals, Second Circuit, Order dated February 16, 1988 (Appendix A) (Docket 87-4112) makes no distinction between the two projects and combines both projects (9074 and 8719) and refers to them as one license application. Not so, one is for a license (9074) and the other for a permit (8719).

The confusion led petitioner to filing a timely "Petition for Rehearing" (Rule 40) dated February 29, 1988, with the Second Circuit pleading for clarification and submitting self explanatory documents defining petitioners "Party Status" to the "Proceedings".

Petitioner's "Petition for Rehearing" was denied by the Second

Circuit without explanation, approximately three months later, May 25, 1988. (Appendix C)

The oral argument held January 27, 1988 at the Second Circuit, along with the Petitioner's "Petition for Rehearing" (Rule 40) dated February 29, 1988 will support petitioner's "Party Status" for FERC projects 8719 and 9074.

Petitioner asserts that the Second Circuit Court of Appeals erred in agreeing with the FERC Order of August 31, 1987, (Appendix B) denying him "Party Status."

The key issue is whether petitioner's timely "Motion to Intervene" dated May 24, 1985 (Appendix D) for FERC projects 8719 and 9074 established "Party Status" to petitioner.

18 CFR 385.214 (c) 1987, "Grant of Party Status" (1). "If no answer in

opposition to a timely motion to intervene is filed within 15 days after the 'Motion to Intervene' is filed, the movant becomes a 'PARTY' at the end of the 15 day period." FERC did not oppose this Intervention letter of May 24, 1985 (Appendix D) making petitioner a "Party" to the "proceedings" for FERC Projects 8719 and 9074. Both FERC project numbers are stated in the Contents of the petitioner's Intervention letter of May 24, 1985; Project 8719 was filed November 15, 1984 with the Commission and advertised in the Warrensburg-Lake George News, April 17, 1985 and, 9074 was filed March 29, 1985 with the Commission and advertised in the Glens Falls Post Star News, August 19, 1986.

18 CFR 385.214(c) 1987 does not require that the "filed" application be

"accepted" by FERC. Filing with the Commission is all that is required. An early "rejection" of the 9074 application was re-instated by appeal to the initial date of filing (March 29, 1985). The Post Star newspaper notice of August 19, 1986 verifies the fact that project 9074 was filed with the Commission March 29, 1985 and this date was never changed.

Finally, when the license (38 FERC 62,087) was issued January 30, 1987, Petitioner again within the allowed 30 day period "protested" the issuance of the license. This protest letter was received timely by FERC on February 3, 1987. "Proof" of receipt by FERC of petitioner's "Motion to Intervene" and protest letter mentioned above are part of "Petition of Rehearing" to the Second Circuit dated February 29, 1988.

FERC was well aware of the Water Rights Deed of October 14, 1895, from the date of the petitioner's Intervention letter of May 24, 1985 to the day of license award, January 30, 1987 or approximately one and one-half years.

Petitioner certifies that he was never served or received any documents whatsoever from FERC relative to FERC Projects 8719 and 9074. FERC did not offer any proof to the contrary.

It appears rather evident that FERC surreptitiously made every effort to keep petitioner totally uninformed of all proceedings for Projects 8719 and 9074.

The deadline for filing "Motion to Intervene" was May 31, 1985 for 8719 and September 18, 1986 for 9074. Petitioner's "Motion to Intervene", dated May 24, 1985 was therefore "timely" for

both projects as it was filed "within" these deadline dates.

In Glenn v. Garrett, Tex. Civ. App., 84 S.W. 2d 515, 516,

WITHIN:: when used relative to time, has been defined variously as meaning any time before, at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than.

The "proceeding" therefore would be all steps in the licensing action between the initial "filing" of the application with the Commission and the day of actual issuance of license. Petitioner's "Motion to Intervene" was submitted to FERC within this period on May 24, 1985 for both Projects, 8719 and 9074. Petitioner's "Party Status" was verified by the Commission under 18 CFR 385.214(c) 1987.

In Statter v. United States, C.C.A. Alaska, 66F. 2d 819, 822, "Proceedings",

includes all the steps or measures adopted in the prosecution or defense of the action. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to execution of judgement.

CONCLUSION

Based on the foregoing, Petitioner urges this Court to grant his petition for writ of certiorari.

Respectfully submitted,

By _____

WALTER J. SHOSTAK
Walter J. Shostak, pro-se
29 West 12th Street
Bayonne, New Jersey 07002
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APPENDIX

APPENDIX A

Docket No. 87-4112
Filed February 16, 1988

FEDERAL ENERGY
REGULATORY COMMISSION
9074-000
8719-000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals for the Second Circuit of New York, on the 16th day of February, one thousand nine hundred and eighty-eight.

PRESENT:

Hon. James L. Oakes,
Hon. Jon O. Newman,
Hon. Roger J. Miner,
Circuit Judges.

Walter J. Shostak,

Petitioner.

v.

Federal Energy Regulatory Commission,

Respondent.

Docket No. 87-4112

O R D E R

Walter Shostak, pro se, appeals the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") dismissing his petition to intervene in an administrative proceeding involving a license application for a hydroelectric project and his appeal to the Commission of its order granting the license. Because the Commission followed the proper procedures in publishing notice of the licensing proceeding, and because it properly denied Shostak's untimely motion to intervene, we affirm the Commission's dismissal.

Shostak argues that the notice provided by FERC was improper because it was not published in the newspaper closest to the proposed project site.

Docket No. 87-4112

However, the relevant statute only requires that FERC publish notice of any licensing proceeding in a newspaper located within the same county as the project, 16 U.S.C. § 797(f) (1982), and it is clear that it satisfied this requirement.

It is likewise clear that Shostak's attempt to intervene was untimely, and that the Commission acted properly in denying him intervenor status. Because FERC regulations provide that staff actions may only be appealed to the Commission by a party, see 18 C.F.R. § 385.1902(a) (1987), and Shostak was not such, the Commission correctly denied his appeal.

Shostak's final argument is that he is entitled to an appeal of the denial of his request for a rehearing. Although

Docket No. 87-4112

both parties discuss the issue of timeliness, we affirm on the basis that Shostak presented no evidence suggesting that FERC did not act properly in denying his request. The issues concerning his claimed water rights will be determined in a state court condemnation proceeding if agreement is not reached.

Judgment affirmed.

JAMES L. OAKES,

N.B. This summary
order will not be
published in the
Federal Reporter
and should not be
cited or otherwise
relied upon in
unrelated cases
before this or any
other court.

JON O. NEWMAN,

ROGER J. MINER,
Circuit Judges.

40 FERC 61,204

APPENDIX "B"

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse,
Chairman;
Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt
and C.M. Naeve.

Adirondack Hydro) Project No. 9074-010
Development Corp.

Schroon River) Project No. 8719-003
Hydro Associates

ORDER DENYING APPEAL AND REJECTING
HEARING REQUEST

(August 31, 1987)

On November 15, 1984, Schroon River Hydro Associates filed in application for preliminary permit for Project No. 8719. On March 29, 1985, Adirondack Hydro Development Corporation (Adirondack) filed a competing application for license for Project No. 9074. September 18, 1986, was the deadline for filing

Project Nos. 9074-010 and
8719-003

project comments and motions to intervene in the Project No. 9074 Proceeding.^{1/}

On January 30, 1987, the Director, Office of Hydropower Licensing (Director), issued an order granting a license to Adirondack for Project No. 9074 and denying Schroon River's preliminary

^{1/} Public notice of the permit application was published in the Warrensburg-Lake George News, Warren County, New York, on April 15, 1985. Public notice of the license application was published in the Glen Fall Post-Star, Warren County, New York, on July 29 and August 5, 12, and 19, 1986. Although the notices of the applications were published in different newspapers, apparently because different staff members handled them, both notices were proper, in that they were printed in a daily or weekly newspaper published in the county where the project is to be located, as required by the Federal Power Act, 16 U.S.C. § 757(e) and (f) (1982).

Project Nos. 9074-010 and
8719-003

permit application for Project No. 8719. 2/ On February 3, 1987, Walter J. Shostak filed an untimely motion to intervene in Project Nos. 8719 and 9074. 3/ On March 23, 1987, Mr. Shostak filed an untimely appeal of the Director's January 30, 1987 order and requested an extension of time in which to file the appeal because he stated that he did not receive a copy of the Director's January 30, 1987 order. On April 22, 1987, the Commission's Secretary issued a notice denying Mr. Shostak's motion for extension of time and rejecting his late-filed appeal. The Secretary's notice explained that,

2/ 38 FERC ff 62,087 (1987)

3/ Mr. Shostak had in fact already become a party to the permit proceeding in Project No. 8719.

Project Nos. 9074-010 and
8719-003

according to the Commission's records, the Director's January 30, 1987 order was on the same day served by mail on Mr. Shostak and all other parties on the service lists for Project Nos. 9074 and 8719, and that none of these mailings were returned to the Commission. The notice further explained that service of a document is effectuated when the document is deposited in the mail, that a Commission mailing establishes a rebuttable presumption that it was received by the addressee, and that Mr. Shostak had not rebutted this presumption.

On May 19, 1987, Mr. Shostak appealed the April 22, 1987 notice rejecting his late-filed appeal. On July 6, 1987, the Commission's Secretary issued a notice denying as untimely Mr.

Project Nos. 9074-010 and
8719-003

Shostak's February 3, 1987 motion to intervene in the Project No. 9074 licensing proceeding, and finding that Mr. Shostak's May 19, 1987 appeal of the April 22, 1987 notice was not proper, since Mr. Shostak is not a party to the licensing proceeding for Project No. 9074. The notice also advised that Mr. Shostak's May 19, 1987 appeal of the April 22, 1987 notice was denied by operation of law on June 18, 1987, subject to any request for rehearing under the Commission's regulations, 18 C.F.R. § 385.713 (1987). The notice further pointed out that only a party to the proceeding may request rehearing.

On July 31, 1987, Mr. Shostak filed a document entitled "Request for Rehearing," wherein he requests reversal

Project Nos. 9074-010 and
8719-003

of the Secretary's July 6, 1987 notice and rescission of the license issued to Project No. 9074. 4/ Mr. Shostak

4/ In his filings, Mr. Shostak states that he is the owner of property that would be affected by the construction of Project No. 9074, and that he holds the water rights necessary to operate the project. Mr. Shostak has asserted that, although he does not oppose the construction of Project No. 9074, the license for the project should not be issued until the water rights for the project have been resolved. However, a license applicant's lack of water rights for a project at the time of Commission action is not a sufficient basis for denial of the application, because the property rights that cannot be acquired by the licensee by purchase agreement can be acquired by eminent domain pursuant to Section 21 of the Federal Power Act, 16 U.S.C. § 814, with compensation for the property rights so acquired. Standard Article 5 of the license for Project No. 9074 requires the licensee, within five years from the date of issuance of the license, to acquire title in

(continued...)

Project Nos. 9074-010 and
8719-003

asserts that his filing of February 3, 1987, which he titled "Motion to Intervene" and "Protest," was not a motion to intervene but was instead a timely appeal of the issuance on January 30, 1987, of a license for Project No. 9074.

Since the July 6 notice of which Mr. Shostak seeks reversal was issued by the Secretary pursuant to delegated authority, that part of his "Request for Rehearing" is actually an appeal of staff action pursuant to 18 C.F.R. § 385.1902 (1987). Since party status 5/ is a pre-

4/ (. . . Continued) fee or the right to use in perpetuity all property (other than lands of the United States) necessary or appropriate for the construction, maintenance, and operation of the project.

5/ In his rehearing request Mr. Shostak cites the license order, which notes that "any party" may appeal

(Continued . . .)

Project Nos. 9074-010 and
8719-003

requisite to filing an appeal or rehearing request (except of a denial of intervention), recharacterizing his February 3, 1987 filing as an appeal does not cure his lack of intervenor status. Moreover, Mr. Shostak's pleading was filed February 3, 1987, but was dated January 28, 1987. Since it was dated two days before the license was issued, the pleading cannot be treated as an appeal of the order issuing license.

Irrespective of the denial of Mr. Shostak's late motion to intervene, which we uphold for the reasons stated in the Secretary's July 6, 1987 notice and in

5/ (Continued . . .) it , and states that he assumes that "any party" means "one does not have to be an attorney." However, "party" means an applicant respondent, or a person who has been granted intervenor status. 18 C.F.R § 385.102(c) (1987).

Project Nos. 9074-010 and
8719-003

note 1 of this order, his July 31, 1987 petition seeking rescission of the January 30, 1987 order issuing a license for Project No. 9074 is untimely. As the Secretary's July 6 notice pointed out, Mr. Shostak's appeal of the Secretary's April 22, 1987 rejection of his late appeal of the license order was denied by operation of law on June 18, 1987 (18 C.F.R. § 385.1902(c) (1987)). Requests for rehearing of the denial were therefore due by July 20, 1987. 6/ The deadline for rehearing requests is statutory and cannot be extended or waived by the Commission. 7/

6/ 18 C.F.R. § 385.713(b) (1987). Because the thirtieth day (July 18) fell on a Saturday, the last day for filing a rehearing request was Monday, July 20, 1987. See 18 C.F.R. § 385.2007(a)(2) (1987).

7/ 16 U.S.C. § 3251(a) (1982).

Project Nos. 9074-010 and
8719-003

The Commission orders:

(A) The appeal filed by Walter J. Shostak on July 31, 1987, of the Secretary's July 6, 1987 notice denying his late motion to intervene is denied.

(B) The request for rehearing filed by Walter J. Shostak on July 31, 1987, of the June 6, 1987 denial by operation of law of his May 19, 1987 appeal of the Secretary's April 22, 1987 notice rejecting his March 23, 1987 late appeal in Project No. 9074 is rejected as late.
By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary

Docket No. 87-4112
Filed May 25, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS
for the
Second Circuit

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of May one thousand nine hundred and eighty eight.

Present: HON. JAMES L. OAKES,
HON. JON O. NEWMAN,
HON. RALPH K. MINER,
Circuit Judges

WALTER J. SHOSTAK,

Petitioner

v

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

A petition for rehearing
having been filed herein

by Petitioner, WALTER J. SHOSTAK,
pro se,

Upon consideration thereof, it
is **ORDERED** that said petition be
and it hereby is **DENIED**.

Elaine B. Goldsmith,
Clerk

APPENDIX D

Certified No. P-419-336-826
Return Receipt Requested
Special Delivery

May 24, 1985

Mr. Kenneth F. Plumb, Secretary
Federal Energy Regulatory Commission
825 North Capital Street N.E.
Washington, D.C. 20426

"MOTION TO INTERVENE"

"PROTEST"

Subject

Schroon River Hydro Associates .
Preliminary Permit Application Number
8719-000 filed November 15, 1984 for the
Warrensburg, N.Y. Schroon River
Hydroelectric Power Plant project and
filed with the Federal Energy Regulatory
Commission March 27, 1985 in the
Warrensburg-Lake George news, Wed, April
17, 1985.

Attachments:

- 1 - Legal Notice as described in the Warrensburg-Lake George News Wed. April 17, 1985.
- 2 - Application for Preliminary Permit for the Schroon River Project by Schroon River Hydro Associates ; Dated November 1984, and Numbered P-8719-000 by Federal Energy Regulatory Commission on Nov. 15, 1984.
- 3 - Property ownership Deed of Walter J. Shostak filed in Book 582, Page 820 and Dated 7/11/74.
- 4 - Property Survey of Schroon River Property of Walter J. Shostak Dated 4/17/80.
- 5 - Reference to this Project No. P-8719-000 and any other present or future such project the applicable Water Rights Deed filed in Book 74 . Page 270 Dated 10/14/1895.

SUMMARY

By virtue of the attachments, the subject applicant or anyone else is prohibited by the Water Rights Deed of October 14, 1895 as filed in Book 74, Page 270, in making any alterations to the dam mentioned above in the Schroon River, Warrensburg, New York. Major alterations are anticipated by the subject applicant to this "EXISTING DAM."

Based on the above, it is requested by the writer of this letter this Schroon River Water Project be denied until "Resolution of the Water Rights ISSUE is ACHIEVED."

Sincerely,

Walter J. Shostak
29 West 12th Street
Bayonne, New Jersey 07002

Letter Dated May 24, 1985

List of Distribution:

Mr. Fred E. Springer, Director
Division of Project Management Branch
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Schroon River Hydro Associates
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Mr. Edward Tracy
Federal Energy Regulatory Commission
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State of New York
Adirondack Park Agency
P.O. Box 99
Raybrook, New York 12977

Mr. Eckhardt C. Beck
U.S. Environmental Protection Agency
Region II
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New York, New York 10007

N.Y.S. Dept. of Environmental
Conservation
Division of Regulatory Affairs
50 Wolf Road
Albany , New York 12201
Attn: Mr. Fred Howell

Adirondack Hydro Development Corporation
Potsdam Industrial Plaza
Potsdam, New York 13676
Attn: Project No. 9074-000
Schroon River Water Project

Federal Energy Regulatory Commissioners
Mr. Raymond J. O'Connor
Mr. Oliver G. Richard III
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